No. 12662

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CENTRAL FRUIT & VEGETABLE CO., and WEST TEXAS PRODUCE COMPANY,

Appellants,

vs.

ASSOCIATED FRUIT DISTRIBUTORS OF CALIFORNIA, RAYMOND M. CRANE, RED LION PACKING COMPANY and JOHN C. KAZANJIAN,

Appellees.

OPENING BRIEF OF APPELLANTS.

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TOPICAL INDEX.

TABLE OF AUTHORITIES CITED

CASES PAGE

STATUTES

PAGE

TEXTBOOKS

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Jurisdictional Statement.

This case originated with a complaint filed with the Secretary of Agriculture under the *Perishable Agricultural Commodities Act,* 7 U. S. C. A., Section 499, by Central Fruit and Vegetable Co. (hereinafter referred to as "Central Fruit") and West Texas Produce Co. (hereinafter referred to as "West Texas Produce"), appellants herein, against Raymond M. Crane, doing business as Associated Fruit Distributors (hereinafter referred to as

"Crane") and John C. Kazanjian, doing business as Red Lion Packing Company (hereinafter referred to as "Kazanjian"). [Tr. p. 16.] The jurisdiction of the Secretary of Agriculture upon such complaint was derived from 7 U. S. C. A., Section 499f(a).

After formal hearing on the issues raised by the complaint and the answers of Crane and Kazanjian [Tr. pp. 33 and 38], the Secretary of Agriculture awarded reparation damages in favor of Central Fruit against Kazanjian in the amount of $6,133.26, in favor of West Texas Produce against Kazanjian in the sum of $10,112.16, together with interest on each award at 5% per annum from December 10, 1944, until paid. The complaint was dismissed as to Crane. [Tr. p. 63.]

Kazanjian appealed to the United States District Court for the Southern District of California under the provisions of 7 U. S. C. A., Section 499g(c). [Tr. p. 3.]

The District Court conducted a trial *de novo,* as a result of which it rendered a judgment dismissing the action as against both Crane and Kazanjian. [Tr. p. 84.] It is from such judgment that this appeal is taken to this court.

A motion for new trial [Tr. p. 88] was denied by the District Court. [Tr. p. 108.] Within the time permitted by law, notice of appeal to this court was duly filed. [Tr. p. 109.]

This court is vested with jurisdiction on appeal from the final decision of the District Court by virtue of the provisions of 28 U. S. C. A., Section 1291.

Statement of the Case.

Succinctly stated, the facts of this case are these:

Crane, a Los Angeles fruit broker, had discussed with Kazanjian, a grower, the sale of Kazanjian's grapes out of storage, Crane to provide the storage facilities. [Tr. pp. 336, 337.] Crane had handled the sales of most, if not all, of Kazanjian's grapes during 1944. [Tr. p. 350.]

On September 26, 1944, Crane transmitted to 13 brokers, including Margules (Southwest Brokerage Company of Dallas, Texas) what is known as a "booking" telegram.* Crane advised these brokers that he could book nine cars of Emperor grapes U. S. No. 1 quality and nine cars of Emperor grapes of unclassified quality, all at a price of $2.53 per lug net to the shipper, that the offer was being made subject to confirmation, that the terms called for $500.00 per car part payment upon confirmation of the sale, that delivery would be made out of storage on and after December 10th, packing to commence about October 9th, and that the buyer was to pay a $50.00 per car procurement brokerage charge to Crane. [Tr. p. 450.]

Several days later, on October 2nd, Crane sent a further telegram to the aforementioned brokers advising that he had secured a revised deal, and that he was now quoting 15 cars of Emperor grapes of U. S. No. 1 quality at a price of $2.50 per lug, otherwise the same transaction as previously indicated. [Tr. p. 451.]

On October 2, 1944, Margules, by teletype, notified Crane that the deal was "okay" as to 6 cars to Fort Worth

*For the convenience of the court all of the telegrams and teletype messages appear in chronological order in the Appendix to this brief.

and 4 cars to Dallas at $2.50 net, and $50.00 per car commission to Crane if such commission were legal. [Tr. p. 475.] Crane immediately replied by teletype that he hadn't been able to contact the shipper as yet but was certain that the deal was satisfactory. He said he would wire Margules definitely one way or the other as soon as he had contacted the shipper. He also assured Margules that it was entirely legal for the receiver to pay a buying brokerage commission. In this teletype message, Crane revised the previous terms by stating that he understood a $1,000.00 per car deposit would be required to be paid upon each U. S. No. 1 inspection at the time the grapes were loaded. [Tr. pp. 475, 476.]

By teletype message immediately following, Margules advised Crane that as far as he knew, that covered the transaction, and he requested Crane to wire him that evening. [Tr. p. 476.] That same evening, Crane sent a telegram to Margules stating definitely that he had secured confirmation from Kazanjian on the ten cars of grapes "as outlined." He requested that Margules collect the deposits so that they could be forwarded to Crane as soon as government inspection reports had been wired upon each car. [Tr. p. 25.]

The next morning, October 3rd, Crane sent a teletype message to Margules in which he inquired as to whether Margules had sold the entire 10 cars of Emperors. [Tr. p. 474.] By teletype message, Margules immediately expressed surprise at the inquiry, stating that he had ordered and Crane had confirmed the 10 cars by telegram of the previous day. [Tr. p. 475.]

On the same day, Crane, apparently after a telephone conversation with Kazanjian, sent a telegram to Kazan-

jian stating unequivocally that he had sold for Kazanjian's account at a price of $2.50 per lug net to Kazanjian, *10 cars of Emperors, $1,000.00 per car deposit,* and 5 cars of Emperors, $750.00 per car deposit. He further stated that he was depending upon Kazanjian to permit him to handle the balance of the cars that Kazanjian had mentioned for fresh shipment. He also stated that he would forward confirmations to Kazanjian for signature as soon as they were received via air mail from the buyers. [Tr. p. 453.]

On October 3rd, Margules sent triplicates of a form known as Standard Memorandum of Sale to each, Central Fruit, West Texas Produce, and Crane. This memorandum described the seller as Associated Fruit Distributors (Crane) for the account of Kazanjian. The terms specified in such memorandum of sale were the terms theretofore submitted by Crane to Margules. The Standard Memorandum of Sale was signed by Margules as broker. [Tr. pp. 26-28.]

On October 4th, Kazanjian sent a telegram to Crane in which he stated that the sale of 15 cars of storage U. S. No. 1 Emperor grapes for conversion on December 10th, was satisfactory at $2.50 f.o.b. Exeter; that the deposits were to be paid immediately on inspection at the shipping point; that Crane was to arrange for the storage as he had agreed; that Kazanjian intended to load the balance of his pack after October 20th and would be glad to make a deal on the same about October 15th. [Tr. p. 454.]

On October 10, 1944, Margules sent a telegram to Crane stating that he understood that the O. P. A. ceiling price on table grapes had been eliminated, and he wanted to know whether there was anything to prevent immediate

shipment of some of the cars, instead of placing them all in storage. [Tr. p. 481.] Crane thereupon replied by telegram to Margules, stating that Kazanjian, the shipper, took the view that the lifting of the ceiling price had voided any contracts as to Emperor grapes. He stated that Kazanjian was willing to give a trade preference to appellants for grapes already packed at the market price which that day was $3.25 per lug. [Tr. p. 481.] Kazanjian admits that Crane acted as his agent in making such counter-offer. [Tr. p. 289.]

Margules then immediately communicated by telegram with T. C. Curry, War Food Administrator, in Washington D. C., and inquired whether the effect of lifting the ceiling price was to invalidate existing contracts such as the instant one. [Tr. p. 482.] The following day (October 11th), the War Food Administrator replied to Margules by telegram, advising that the lifting of the O. P. A. ceiling would have no such effect. [Tr. p. 479.] Margules thereupon immediately sent a telegram to Crane advising of the War Food Administration opinion, and requesting that Crane get a definite answer one way or the other from Kazanjian as to whether the contract would be performed. [Tr. p. 480.]

On October 12th, Crane telegraphed Margules that Kazanjian was willing to sell *uninspected* Emperor grapes at $3.00 per lug, plus a 10¢ per lug procurement charge to Crane; that Kazanjian felt that by making such offer, he was relieved of all moral responsibility, and that Kazanjian was turning down offers for his entire outfit that day on the basis of $3.40 per lug cash. [Tr. p. 476.]

On October 13, 1944, Margules rejected Kazanjian's compromise offer and once again requested immediate advise by wire as to whether the contract of sale would

be fulfilled by the seller. [Tr. p. 479.] Also, that same day, Margules, by telegram, made a similar demand directly upon Kazanjian. [Tr. p. 477.]

On October 16, 1944, Crane, by teletype message, notified Margules that he had again talked to Kazanjian, who was definitely unwilling to abide by any sale made where the ceiling had been a definite consideration, and Crane suggested that Margules take whatever action he deemed advisable. [Tr. p. 482.]

The foregoing facts are undisputed, and in the main, are evidenced by the written communications of the parties. Based upon these facts, the Secretary of Agriculture found that on October 2, 1944, Kazanjian had orally authorized Crane to confirm the sale to Central Fruit and West Texas Produce; that Crane as a broker, was not solely the agent of the buyers, but was also the agent of the seller for the purpose of locating buyers and transmitting offers and counteroffers; that the statute of frauds of the State of California did not render the sale unenforceable as there was a sufficient memorandum of the sale in writing from the various telegrams and teletype messages which satisfied the statute of frauds; that the telegram of October 4, 1944, from Kazanjian to Crane constituted a written ratification by Kazanjian of Crane's authority to confirm the sale on his behalf; and, that Kazanjian was therefore liable to Central Fruit and West Texas Produce Co. for wrongful refusal to deliver the grapes which he had contracted to sell. [Tr. pp. 41-63.]

Based upon the same documentary evidence, the District Judge, on trial *de novo,* held that by the use of the words "part payment with confirmation," and, "subject to confirmation" in Crane's original offering telegram of

September 26, 1944, *Crane intended* that the sale be negotiated by use of a form known as "Standard Confirmation of Sale"; that Crane acted as buying broker and agent for appellant buyers and was not the agent for Kazanjian in this transaction; that the telegrams which Crane sent to Margules required that any contract entered into would be confirmed in writing by all parties, and in particular, Kazanjian; that Kazanjian never accepted the terms allegedly proposed by Margules; that neither Margules nor appellants ever accepted terms allegedly proposed by Kazanjian to Crane in his telegram of October 4th; that no binding contract could have been entered into by either Margules or Crane in behalf of appellants because of the absence of written authority for such agency in accordance with California law; that Crane did not misrepresent any facts whatsoever to Margules or appellants; and, that none of the statements made by Crane were fraudulent or created liability on his part. The District Judge also found that the price agreed upon for the grapes was in excess of the permissible price under the Federal Emergency Price Control Act, but he drew no conclusion of law therefrom, except that in his memorandum opinion, the District Judge stated that he desired to indicate to counsel that if he is reversed by the higher courts on the question of whether there was a contract or not. he would then hold that the contract was in violation of the maximum price regulation. The District Judge further stated that, if reversed, he would find that the damages would be determined by the market value of grapes on October 24, 1944, the first date when appellants purchased some replacement grapes. A finding to such latter effect was included in the findings of fact, conclusions of law and judgment.

Questions on Appeal.

The questions upon this appeal arise from the error of the District Court both as to findings of fact and conclusions of law. These questions may concisely be stated as follows:

1. Was not Crane a broker acting for both buyers and seller, and the agent of both in this transaction?

2. Was there a contract between the parties?

   (a) Was Crane's uncommunicated intention that a Standard Confirmation of Sale be used in consummating the sale, binding upon either buyer or seller without notice of such undisclosed intention?

   (b) Was it proper for the District Court to admit parol evidence of an undisclosed intention for the purpose of varying an unambiguous provision of a contract?

   (c) Was there anything in Crane's telegrams to Margules which can support the finding of fact by the District Judge that these telegrams required that the contract of sale be signed by all parties, particularly Kazanjian?

   (d) Were there any new terms proposed by Margules?

   (e) Were terms proposed by Kazanjian in his telegram to Crane of October 4th which required acceptance by Margules or appellants?

3. Is the contract of sale herein unenforceable because of the provisions of the statute of frauds of the State of California?

   (a) Does the statute of frauds of the State of California apply to this type of proceeding?

   (b) Even if applicable herein, does not the California Statute of Frauds apply only to the "party to be charged"?

4. If it is not true that Kazanjian authorized Crane to notify Margules that Kazanjian had confirmed the sale, was it not a misrepresentation for Crane to notify Margules that Kazanjian had confirmed the sale?

5. Was the contract herein in violation of the Emergency Price Control Act and therefore void?

6. Does the fact that on October 24th, appellants commenced purchasing replacement grapes in an effort to minimize damages, constitute an acquiescence in the repudiation of the contract, and thus establish October 24th as the date for measuring damages as distinguished from December 10th, the date of performance under the provisions of the contract?

Specification of Errors.

I.

Error as to Finding of Fact No. V that Crane intended "subject to confirmation" and "part payment with confirmation" in his September 26, 1944, telegram to mean a form known as "Standard Confirmation of Sale," such error consisting of: (a) irreconcilable conflict between the finding and the testimony of Crane that he did not consider any other document necessary after he received the Standard Memorandum of Sale; (b) irreconcilable conflict with Crane's testimony that telegrams are sufficient confirmation; (c) irreconcilable conflict between the finding and Crane's testimony that the word "confirmation" does not necessarily mean a "Standard Confirmation of Sale"; (d) irreconcilable conflict with the evidence of Crane's conduct in failing to object to the Standard Memorandum of Sale and failing to request a Standard Confirmation of Sale; (e) irreconcilable conflict with the testimony of Crane's traffic manager that the transaction did not contemplate a Standard Confirmation of Sale; (f) inherent improbability of the finding because of its attributing an artificial meaning to plain and unambiguous language; (g) inherent improbability of such finding in relationship to the trade meaning of such terms as disclosed by the rules of the Secretary of Agriculture which are printed on both Standard Confirmation of Sale and the Standard Memorandum of Sale forms; and, (h) the fact that such finding was induced by the District Court's erroneous view of the law that a unilateral and uncommunicated special intention as to the meaning of plain language by one party to a contract can bind other parties to the contract.

II.

Error as to that portion of Finding No. IX that the parties never entered into a written agreement of sale, such error consisting of: (a) the lack of any findings of fact or evidence to justify such finding, which is in reality a conclusion; and, (b) irreconcilable conflict between the finding and the exchange of telegraphic communications between the parties which appear in the appendix hereto, and which constitute a written contract of sale.

III.

Error as to that portion of Finding No. IX that Kazanjian at no time executed a written ratification of the sale, said error consisting of the failure of the District Court to give effect to Kazanjian's telegram to Crane of October 4, 1944, in which Kazanjian ratified Crane's sale of grapes for Kazanjian's account.

IV.

Error as to that portion of Finding No. IX that appellants had contracted to pay a sum in excess of the ceiling price established under the Emergency Price Control Act, in that the evidence reveals that the price for the grapes was not in excess of the ceiling price, and the $50.00 per car constituted a procurement charge paid by the buyer to a procurement broker, and was not part of the purchase price of the commodity sold.

V.

Error as to that portion of Finding No. X that the statements made by Crane to Margules were not false or fraudulent and were made without any intention to defraud Margules or the appellants, such error consisting

of: (a) inherent impossibility of such a finding if the District Court were correct in its conclusion that Kazanjian had not authorized Crane to confirm the sale, the court having found that Crane did notify Margules that Kazanjian had confirmed the sale; (b) irreconcilable conflict with the testimony of Crane that he intended Margules and appellants to rely upon his notification to them that Kazanjian had confirmed the sale; and, (c) inherent improbability of the finding in the light of Kazanjian's testimony that Crane advised him to ignore appellants' demand for performance of the contract.

VI.

Error as to that portion of Finding No. X that Kazanjian did not have any agent carrying on any transactions in his behalf with any person outside of the State of California, such error consisting of: (a) irreconcilable conflict of such finding with the testimony of Kazanjian that he had asked Crane to secure for him a storage deal, and had arranged with Crane to provide the storage facilities therefore; (b) irreconcilable conflict with the testimony of Crane that Kazanjian had authorized him to submit a storage deal on Emperor grapes at ceiling prices; (c) irreconcilable conflict with the testimony of Crane that Kazanjian was at all times familiar with Crane's negotiations in this transaction and approved of same; (d) irreconcilable conflict with the testimony of both Kazanjian and Crane, that Crane acted as Kazanjian's agent for the sale of Kazanjian's grapes during 1944, and he was his agent for such purpose both before and after the period in which ceiling prices applied to the sale of such grapes; (e) irreconcilable conflict with the testimony of Kazanjian that Crane was his agent in

connection with the counter-offer made by Kazanjian to appellants after the repudiation of the contract by Kazanjian; and, (f) the fact that the District Court was induced into such finding by an erroneous view of the law, wherein the District Court failed to recognize that a broker is an intermediary who may act for both buyer and seller, and to the extent to which his allegiance favored Kazanjian, with Kazanjian's approval, he was the agent of Kazanjian.

VII.

Error as to that portion of Finding No. X that the parties never at any time finally agreed upon the terms of the contract for the sale of the 10 cars of grapes and that there was no meeting of the minds of the parties as to the terms of the proposed sale, such error consisting of: (a) irreconcilable conflict between such finding and the written communications exchanged between the parties which appear in the appendix herein which clearly evidence a full and complete meeting of the minds of the parties hereto; (b) inherent improbability of such finding in relationship to the conduct of the parties, the evidence revealing that the only claim or excuse for the breach of contract which was mentioned in the correspondence of the parties was based upon an alleged frustration of the contract by virtue of the lifting of the ceiling price on grapes; (c) the absence of any findings of fact or credible evidence to justify the finding, which is in fact, a conclusion of law; and, (d) the failure of such finding to specify wherein there was any disagreement of the parties with respect to the terms of the contract or sale agreed upon.

VIII.

Error as to Conclusion No. 2 to the effect that the telegram sent by Crane to Margules required that any contract entered into should be confirmed in writing by the parties to the proposed contract and in particular, Kazanjian, such error consisting of the fact that the said telegrams do not contain any such requirement expressly or impliedly.

IX.

Error as to Conclusion No. 2 to the effect that Kazanjian never accepted the terms proposed by Margules and that the terms proposed by Kazanjian to Crane in his telegram of October 4th, were never accepted by Margules or appellants, such error consisting of: (a) the absence of finding of fact or evidence to justify such conclusion; (b) the absence of evidence that Margules ever proposed any terms; and, (c) the fact that the telegram of October 4th from Kazanjian to Crane did not propose new terms requiring acceptance by Margules or complainants.

X.

Error as to Conclusion No. 3 to the effect that no binding contract could have been entered into by Margules or Crane in behalf of the appellants unless the authority to Margules and Crane was in writing, the District Court having thereby erroneously held that the statute of frauds of the State of California is applicable to a reparation proceeding brought under the Perishable Agricultural Commodities Act, and the District Court further having erroneously held that the statute of frauds of the State of California requires that a memorandum of the agreement be signed not only "by the party to be charged" but by the "charging party" as well.

XI.

Error as to Conclusion No. 4 to the effect that appellants acquiesced in the repudiation of the contract on October 24, 1944, by undertaking to replace the grapes and that the measure of damage would therefore arise as of October 24, 1944, such error consisting of: (a) the absence of findings of fact or evidence justifying a conclusion that the appellants ever acquiesced in the repudiation by Kazanjian; (b) the purchase of replacement grapes was proper to minimize damages and did not constitute an acquiescence in the repudiation; (c) the District Court erred in failing to recognize that the proper measure of damage in this case is based upon the value of the grapes as of December 10, 1944, the date of contractual delivery, and not the date of repudiation or the date of the purchase of some replacement grapes.

XII.

Error as to Conclusion No. 5 that Crane did not misrepresent any facts to Margules or appellants with reference to the contract, that statements or representations by Crane were not fraudulent, and that no liability arose on the part of Crane for statements made by him to Margules or appellants. Appellants specify the foregoing error only upon the assumption, which is not conceded, that Kazanjian had not confirmed the sale.

XIII.

Error as to Finding of Fact No. VIII that up to November 15, 1944, the reasonable market value of U. S. No. 1 Emperor grapes in carload lots was $3.25 per lug, such error consisting of: (a) the date of December 10, 1944, was the determinative date and (b) the evidence reveals that Kazanjian turned down $3.40 per lug for uninspected grapes as early as October 12, 1944.

XIV.

Error with respect to the admission of evidence as follows:

"Q. Now, Mr. Crane, when you sent the original telegram to Southwest Brokerage of September 26th, and when you sent the amended telegram of October 2nd presenting this offer to procure grapes and in which you used the words *'subject to confirmation,'* were you in that telegram referring to a confirmation by the use of a Standard Confirmation of Sale as known to the trade?

Mr. Hoppenstein: Just a minute. We object to that on the ground that it would be attempting to vary the terms of his own written instrument, and would be an attempt to invade the mental processes of Mr. Crane.

The Court: Objection overruled.

Mr. Hoppenstein: His intention not having been conveyed to the complainants—

The Court: This testimony goes to the custom of the trade. In other words, whether it was his intention to vary the custom of the trade or to follow the custom of the trade.

You may answer the question.

* * * * * * * *

The Witness: Yes, sir." [Tr. pp. 236, 237.]

XV.

The District Court erred in dismissing the action as to Kazanjian.

XVI.

If the dismissal as to Kazanjian was not error, it was error to dismiss the action as to Crane.

Summary of Argument.

Crane was more than procurement broker for appellants. He was a broker acting as intermediary between negotiating parties. He acted as agent for both seller and buyers.

The *prima facie* and presumptive effect of the Secretary of Agriculture's findings and order were never overcome by credible and competent evidence.

The contract of sale, as evidenced in writing, clearly establishes a meeting of the minds.

The finding by the District Court that Crane intended "subject to confirmation" and "part payment with confirmation" to mean execution of a Standard Confirmation of Sale form is erroneous. It is contrary to the plain and ordinary meaning of the language. It is contrary to the trade meaning of the language. It is contrary to Crane's testimony and conduct. It is clearly an "afterthought," such contention not having been mentioned in the correspondence of the parties or before the Secretary of Agriculture. It is an uncommunicated intention, and therefore not binding upon parties unaware thereof. It was error to receive testimony of such intention over appellants' objections.

The District Court read into the contract "requirements" which were not part of the contract. It erroneously construed a confirmation as a proposal of new terms.

The absence of written authority from appellants to their broker did not render the contract unenforceable. A reparation proceeding under the Perishable Agricultural Commodities Act is not barred by the California Statute of Frauds. The appellants were not the parties "to be charged" in this proceeding. The agency between appellants and Margules is governed by Texas law where the Statute of Frauds does not apply to this type of transaction.

The District Judge not only erroneously held that Kazanjian had not confirmed the sale, but he also held that it was not a false statement for Crane to notify appellants that Kazanjian had confirmed the sale.

The contract is not void because of a violation of the regulations under the Emergency Price Control Act. The commission which appellants agreed to pay for procurement services to Crane was not part of the purchase price of the grapes to Kazanjian.

Damages are properly measured as of the date when delivery should have been made under the contract, not the date of repudiation. Efforts to replace the grapes prior to such date for the purpose of minimizing damages does not constitute an acquiescence or acceptance of the repudiation or breach.

ARGUMENT.

I.

The District Court Erred in Holding That Crane Was Solely the Agent of Appellants. The Evidence Discloses That Crane Acted as a Broker, and in Such Capacity Acted as Agent for Both Appellants and Appellee Kazanjian.

Before consideration of the question as to whether or not a contract had been reached by the parties, it is appropriate that we consider the relationship of appellee Crane to the other parties in this proceeding. The District Court held that Crane was a broker who was solely the agent of appellants.

The evidence before the District Court upon this subject matter consisted of the following:

1. The *prima facie* effect of the conclusion of the Secretary of Agriculture that Crane, as a broker, was the agent of both the seller and the buyers in this transaction. [Tr. pp. 52, 53.]

2. Testimony that Crane acted as agent for Kazanjian in the sale of Kazanjian's grapes, both before and after, but not during the period of time within which O. P. A. ceiling prices were in effect upon grapes. [Tr. pp. 306, 307, 361, 362.]

3. Testimony of Kazanjian that he had asked Crane to submit a storage deal to him with respect to Emperor grapes. [Tr. pp. 336, 337.]

4. Testimony of Crane that Kazanjian was at all times fully informed of the telegrams and communications between Crane and other brokers respecting negotiations for the sale of Kazanjian's grapes. [Tr. pp. 212, 213.]

5. Kazanjian's denial of such knowledge. [Tr. p. 176.]

6. Kazanjian's admission, however, that he may have been aware of these negotiations. [Tr. pp. 176, 177.]

7. Kazanjian's admission that in connection with the sale from storage of Kazanjian's grapes, Crane was to arrange storage facilities for Kazanjian. [Tr. p. 175.]

8. Testimony by Kazanjian that he and Crane were in constant communication with each other during the periods of time aforementioned. [Tr. p. 176.]

9. Testimony of Crane that he notified Kazanjian of the sale for his account by telephone conversation of October 2, 1944. [Tr. pp. 308, 309.]

10. Written notification by Crane to Kazanjian on October 3, 1944, that *Crane had sold grapes for Kazanjian's account.* [Tr. p. 453.]

11. *Written approval by Kazanjian on October 4, 1944,* of Crane's sale of grapes for Kazanjian's account. [Tr. p. 454.]

12. Crane's acceptance without objection of the Standard Memorandum of Sale sent him on October 3, 1944, by Margules, in which document Crane is denominated as seller *for the account of Kazanjian.* [Tr. p. 26.]

13. Proposal of a new offer by Kazanjian through Crane for grapes at a price of $3.25, *as to which proposal Kazanjian admitted that Crane was acting as his agent.* [Tr. pp. 481, 289.]

14. Notification by Margules to Kazanjian on October 13, 1944, of reliance upon *confirmation by Kazanjian*

through Crane, and Kazanjian's failure to deny same. [Tr. p. 477.]

A broker is defined as an intermediary between two negotiating parties. *Rhode v. Bartholomew,* 94 Cal. App. 2d 272, 278, 210 P. 2d 768. In this capacity, he may act as agent for either party or for both parties. *Vahlsing v. Rothstein,* 107 Pa. Supp. 281, 163 Atl. 350.

In 12 *Corpus Juris Secundum,* Sec. 3, p. 8, distinguishing between brokers and other agents generally, it is said:

> "A broker is distinguished from an agent, in that a broker holds himself out for employment by others, and acts as an *intermediate negotiator between the parties* to a transaction, and in a sense is the *agent of both* parties, whereas the elements of exclusiveness of representation of the principal by which he is employed enters into the employment of an agent." (Emphasis supplied.)

Kazanjian did not agree to pay a brokerage commission to Crane because market conditions were such that Crane could get himself employed as the procurement broker of the buyer, thereby passing the cost of the brokerage commission to the buyer. [Tr. p. 361.] Appellants, as buyers in this case, accepted these terms, and accepted Crane as their procurement broker.

Consistent with these facts, Crane procured written confirmation of the sale to appellants from Kazanjian as seller. Crane notified Kazanjian both by telephone and by telegram that he had sold the grapes *for Kazanjian's account.* [Tr. pp. 210, 308, 453.] In doing this, he clearly indicated to Kazanjian that he had acted as agent

for Kazanjian in confirming the sale of the grapes. Kazanjian thereupon notified Crane by telegram that such confirmation in his behalf was satisfactory, thus ratifying Crane's authority for such purpose. [Tr. p. 454.]

On October 10, 1944, the O. P. A. ceiling price on grapes was lifted. Crane notified appellants through their Dallas broker, that Kazanjian repudiated the contract of sale. In this very same message, Crane submitted a counterproposal by Kazanjian to sell grapes already packed at $3.25 per lug. Kazanjian specifically admitted that in making such offer, Crane was acting as his agent. [Tr. p. 289.] In the exchange of telegrams relating to the right of Kazanjian to repudiate the transaction, Crane continuously referred to *instructions given to him by Kazanjian.*

It will be noted from the evidence that Crane performed the normal functions of a broker who represents both buyers and seller, with both buyers and seller fully aware of the dual relationship. Upon these facts, a conclusion that Crane was solely the agent of the buyer is clearly contrary to the evidence and is incompatible with reason and logic.

Significant evidence that Crane was agent for buyers in name only, and that his true fealty was attuned to Kazanjian is deductible from the following testimony given by Kazanjian:

> "I know Ray (Crane) called up once and said they (the buyers) made a demand on the grapes, but he (Crane) said, 'The hell with *them. We* have no deal. Let *them* holler for them all *they* want to.' Those are the very words he used to the best of my recollection." [Tr. p. 290.] (Emphasis supplied.)

In the foregoing excerpt we detect a loyalty and an allegiance from Crane to Kazanjian in sharp contrast to a complete disavowal of interest by Crane in the rights of appellants.

While some contradictory effect to the Secretary's finding may be attributed to the self-serving conclusion of Crane that he was solely the agent of appellants and the self-serving denial by Kazanjian that he had not authorized Crane to act in his behalf, it is obvious that not only was the Secretary's conclusion not overcome thereby, but the testimony of appellees was negatived by Crane's own written admission that he had sold the grapes for Kazanjian's account [Tr. p. 453] and by Kazanjian's own written admission that the sale effected by Crane for his account was satisfactory. [Tr. p. 454.]

The question of Crane's relationship to Kazanjian as an agent is not a crucial one. Even if Crane had been solely the agent of the buyers, Kazanjian is nevertheless liable for the breach of contract. It is immaterial whether he breached the contract through Crane as agent for the seller, or as agent for the buyer, or as we contend, as a broker acting for both buyer and seller.

The Secretary's finding however, that Crane was a broker acting as agent for both buyer and seller was *prima facie* evidence of such fact, and *presumptive* thereof *until overcome* (as distinguished from merely *contradicted by*) other evidence.

Prima facie evidence in the absence of controlling evidence or discrediting circumstances becomes conclusive of the fact.

> *Kelly v. Jackson,* 31 U. S. 622, 6 Pet. 622, 8 L. Ed. 523.

When *prima facie* evidence is introduced, its effect is not destroyed by introduction of contradictory evidence. It stands as proof of that particular fact until it is *both contradicted and overcome by such other evidence.*

> *Miller and Lux v. Secara,* 193 Cal. 755, 227 Pac. 171.

Under the *Perishable Agriculture Commodities Act,* the courts have held that the *prima facie* effect of the Secretary's findings and orders must be *overcome* by the contradictory evidence.

Thus, in the case of *Farris v. Meyer Schuman Co.,* 115 F. 2d 577 (C. C. A. 7th) at page 579, the court said:

> "Under 7 U. S. C. A., Sec. 499g(c), section 7(c) of the Perishable Agricultural Commodities Act * * * the trial on such appeal shall be *de novo* and shall proceed in all other respects as other civil suits for damages, except that the findings of fact and the orders of the Secretary shall be *prima facie* evidence of the facts therein stated. It has been held that the facts found by the Secretary shall stand as the *established facts until sufficient evidence is produced on the trial to overcome them. Spano v. Western Fruit Growers, Inc.,* 10 Cir., 83 F. 2d 150, 152. *See also Blair v. Cleveland, C., C. & St. L. Ry. Co.,* D. C. 45 F. 2d 792, and cases cited therein." (Emphasis supplied.)

In a case involving substantially the same set of facts as well as the same defendants as herein involved, *Joseph Denunzio Fruit Co. v. Crane,* 79 Fed. Supp. 117, 133 (affirmed by this court 188 F. 2d 569), the trial court stated that it was "fantastic" and the credulity of the court was taxed by Crane's contention that he was a buying agent or buying broker. It is our view that although

Crane may technically have occupied the status of buying broker for appellants, he was primarily the representative and agent of Kazanjian, the seller, and that Crane sold for the account of the seller and secured the seller's written ratification and confirmation of such sale.

II.

The Undisputed Evidence Established the Existence of a Binding Contract Between the Parties Hereto.

The contract upon which this action is based is established by undisputed physical evidence, written communications, convenient resort to which may be had in the appendix to this brief. The findings of fact, both of the Secretary of Agriculture and the District Court embrace the text of such communications.

Under Section 1550 of the *Civil Code* of the State of California, a contract requires: (1) parties capable of contracting, (2) their consent, (3) a lawful object, and (4) consideration.

The decision being reviewed on this appeal does not question the existence of parties capable of contracting or the existence of consideration. The conclusions reached by the District Court do not involve the lawfulness of the object of the contract, although the findings of fact indicate that the contract sought to accomplish an illegal purpose, to-wit: the violation of the Emergency Price Control Act. [Tr. p. 80.] The issue of legality will be discussed in a subsequent portion of this brief.

The District Court held that there was no meeting of the minds, thus invalidating the contract of sale for lack of the element of consent. The consent of the parties to

the contract is evidenced by the telegrams and teletype messages that were exchanged between the parties. Insofar as these written communications were not ambiguous, the documents in themselves constitute the contract of the parties. Since the contract can be construed within the borders framed by the four corners of the written instruments, resort to extraneous evidence was error.

Toms v. Hellman, 115 Cal. App. 74, 1 P. 2d 31;

Security-First Nat. T. & S. Bank v. Loftus, 129 Cal. App. 650, 19 P. 2d 297;

Tillis v. Western Fruit Growers, Inc., 44 Cal. App. 2d 826, 113 P. 2d 267.

To support its conclusion that a meeting of the minds was absent in this case, the District Court relied upon the following grounds: (1) Crane, when using the language "subject to confirmation" and "part payment with confirmation," in his original booking telegram of September 26, 1944, intended that such language require that a particular form known as "Standard Confirmation of Sale" be used in the consummation of this transaction [Tr. p. 77]; (2) the telegrams which Crane sent to Margules required that the contract of sale be signed by all of the parties thereto, particularly Kazanjian [Tr. p. 81]; (3) Kazanjian never accepted the terms proposed by Margules [Tr. p. 82]; and, (4) neither Margules nor appellants ever accepted the terms proposed by Kazanjian. [Tr. p. 82.]

In succeeding paragraphs, we will demonstrate that these findings and conclusions were unsupported by credible evidence, are clearly erroneous, and are incompatible with reason and logic.

III.

The District Court's Finding That Crane Intended to Designate a Standard Confirmation Form Is Against the Weight of Credible Evidence.

Two forms of confirmatory documents are used in the interstate perishable agricultural commodities business. One of these documents is known as a "Standard Memorandum of Sale," and the other is known as a "Standard Confirmation of Sale." [Tr. p. 77.] The essential difference between the two documents is in the fact that a Standard Memorandum of Sale is signed by a broker negotiating a sale, and copies are sent to the seller and the buyer. The form known as Standard Confirmation of Sale is signed by the buyer and by the broker or agent for the seller, together with a certification by such broker or agent that he has authority from the seller to sign the same in behalf of the seller. [Tr. p. 78.]

Thus the Department of Agriculture in the case of *Prentice Packing & Cold Storage Co. v. Springer Produce House,* PACA Docket No. 93, S. 129, said:

> "*It is the usual custom throughout the produce trade for the broker to act for both seller and buyer in negotiating sales of this nature* and with this in view, this Department has uniformly held, except in those places where the laws of the jurisdiction are specifically contra, that *the signing of a 'Standard Memorandum of Sale' or a 'Standard Confirmation of Sale' by the broker is sufficient* evidence in writing of the contract to satisfy the requirements of the Statute of Frauds." (Emphasis supplied.)

The use of either of the forms is not mandatory. [Tr. pp. 429, 433.] Crane admitted that a telegram was as sufficient as a Standard Confirmation of Sale. [Tr. pp. 245, 246.] Crane further admitted that as far as the custom of the trade is concerned, the use of a Standard Memorandum of Sale instead of a Standard Confirmation of Sale is entirely an "individual" matter. [Tr. p. 246.] Crane admitted that, *after receiving the Standard Memorandum of Sale from Margules, he considered no other document necessary for the closing of the transaction other than the government inspection reports.* [Tr. p. 249.]

Most transactions are completed through the use of the Standard Memorandum of Sale, which is signed by the broker alone. [Tr. p. 251.] Bockstein, who had been engaged in the interstate produce business since 1905 [Tr. p. 250] didn't believe he ever received a Standard Confirmation of Sale [Tr. p. 251], and he never had occasion to sign one. [Tr. p. 252.] Crane testified that while a Standard Memorandum of Sale is used with respect to goods for immediate delivery, that where *future* delivery is contemplated, the Standard Confirmation of Sale is *always* required. [Tr. p. 216.] The trial court significantly made no finding to such effect.

The court will judicially note that the Standard Rules and Definitions of Trade Terms for the Fruit and Vegetable Industry as promulgated by the Secretary of Agriculture appear in small print upon the reverse side of all copies of the forms known as "Standard Memorandum of Sale" and "Standard Confirmation of Sale." Reference to Respondent's Exhibits L and M consisting of a Standard Confirmation of Sale and a Standard Memo-

randum of Sale respectively, will reveal such rules and definitions of trade terms.*

It is noted from Advisory Rule C, covering "Future Sales or Purchases" of Part II of such Standard Rules that the two forms are mentioned in the *alternative* as to *future sales,* as follows:

> "Note: (Advisory)—Added paragraphs or notations covering special agreements, such as future sales, that differ in any way with any part of the Standard Rules and Definitions of Trade Terms should not be printed in a manner that might indicate they are part of such rules. When the Standard Confirmation of Sale or Broker's Memorandum of Sale forms are used for agreements, such notes or special clauses should in every instance be printed, stamped or written on the face of the contract under a heading 'Special Agreement.'"

Crane, himself, admitted that when he sold other Kazanjian grapes in October and November of 1944, he did not secure a Standard Confirmation of Sale. [Tr. p. 247.] He admitted all of these latter sales were also for *future* delivery. [Tr. p. 247.] He further admitted that these transactions were completed entirely upon confirmation by telegraph. [Tr. p. 247.]

Crane's traffic engineer, James P. Coyn, testified that the execution of either Standard Memorandum of Sale

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*Because of the length of these documents, they were not included in the printed transcript. The originals were transmitted to the Clerk with the record on appeal. The use of the forms mentioned are so widespread in the interstate produce industry that the contents thereof may be judicially noted. The rules and regulations adopted by the Department of Agriculture to enforce the Perishable Agricultural Commodities Act are noticeable judicially. *Standard Oil Co. of California v. United States* (C. C. A. 9), 107 F. 2d 402, 413 (as to similar regulations by the Department of Interior).

or Standard Confirmation of Sale is strictly a formality. As Coyn put it, in most of these sales, the negotiation is completed long before the receipt of the memorandum of sale. [Tr. p. 434.] When asked to interpret the language "will forward confirmation for your signature soons received air mail from buyer," which was contained in Crane's October 3rd telegram to Kazanjian, Coyn testified that it was not his understanding from such language that Kazanjian would receive a contract to sign. Coyn testified that the language meant only that Kazanjian would be entitled to get a copy of the memorandum of sale [Tr. p. 433], and that the receipt of such memorandum was not a necessary step to the completion of the transaction. [Tr. p. 434.]

Crane testified that he seldom even looked at the confirmations as they came in, but relied mostly on the wire transactions. [Tr. p. 220.]

Upon the evidence of Crane alone the District Court concluded that the terms of the contract called for a Standard Confirmation of Sale, and that the contract failed because of non-compliance with such requirement. Such conclusion is not only inconsistent with the weight of the evidence, but it is based upon the testimony of a man who was mentally confused as to what he was talking about. A Standard Confirmation of Sale is *signed by the buyer, and by the seller's broker or agent.* [Tr. p. 78.] Crane's total unfamiliarity with a Standard Confirmation of Sale is revealed by his testimony that such a form is *signed by the seller and by the buyer's broker or agent.* [Tr. p. 248.]

The finding of the District Court that Crane intended that the telegram of September 26th require the use of a

Standard Confirmation of Sale, is strictly unilateral. If the District Court had found that Margules, as recipient of the telegram, so understood such language, or should have so understood it, even then it would not follow that the parties hereto had not entered into a binding contract. The terms of the contract had been fully agreed upon, as evidenced by the exchange of telegrams and teletype wires. Assuming that there was an expressed intention that a formal document such as Standard Confirmation of Sale would be executed, it does not follow that such a requirement constitutes a *condition precedent* to the execution of the contract.

In the case of *National Dairymen's Association v. Dean Milk Co.* (C. C. A. 7th), 183 F. 2d 349, where an offer stated that it was subject to government acceptance for export, it was held that such acceptance was not a condition precedent to liability under the contract.

Section 26 of the *Restatement of the Law of Contracts* provides as follows:

> "Mutual manifestations of assent that are in themselves sufficient to make a contract will not be prevented from so operating by the mere fact that the parties also manifest an intention to prepare and adopt a written memorial thereof; but other facts may show that the manifestations are merely preliminary expressions as stated in section 25."

See also the case of *Lehigh Structural Steel Company v. Great Lakes Construction Co.* (C. C. A. 2), 72 F. 2d 229, 231, wherein, the court said:

> "This rule is illustrated in the decision of the New York Court of Appeals in Sanders v. Pottlitzer Bros. Fruit Co., 144 N. Y. 209, 39 N. E. 74, 29

L. R. A. 431, 43 Am. St. Rep. 757, where a written proposal to sell and deliver certain carloads of apples was accepted with the provision that the agreement should be expressed in a formal writing. The court held that the minds of the parties had met as to all the terms of the contract and that *the subsequent failure to reduce it 'to the precise form intended * * * did not affect the obligations of either party, which had already attached. * * *'* As Justice Holmes said in *American Smelting Co. vs. United States,* 259 U. S. at page 78, 42 S. Ct. 420, 421, 66 L. Ed. 833: 'The expressed contemplation of a more formal document did not prevent the letters from having the effect that otherwise they would have had.' See our decisions in *Bondy v. Harvest* (C. C. A.), 62 F. (2d) 521, and *United States v. P. J. Carlin Const. Co.* (C. C. A.), 224 F. 859, to the same effect." (Emphasis supplied.)

If the contract in this case actually had not been consummated because of a failure to execute a "Standard Confirmation of Sale" it would appear that such defaulting circumstance would have been mentioned in the correspondence between the parties. An examination of the communications between the parties will reveal no such contention. It would also appear that such contention would have been raised in the trial before the Secretary of Agriculture. An examination of the proceedings before the Secretary of Agriculture will reveal the raising of no such contention.

Crane testified that after he received the telegram of October 4, 1944, from Kazanjian stating that the sale was satisfactory, he did not consider any other documentary evidence necessary to close the deal, other than

the government inspection revealing that the merchandise was U. S. No. 1 grade. [Tr. pp. 249 and 316.]

Crane admitted that the term "confirmation" does not necessarily mean a Standard Confirmation of Sale. [Tr. p. 214.]

When Crane received the Standard Memorandum of Sale from Margules signed by Margules as broker, he made no objections thereto, but merely filed same. [Tr. p. 220.] If, as Crane contends, this was not the form called for by the contract, it is unbelievable that he would not have immediately communicated with Margules advising him that he had used an improper form.

Crane, upon cross-examination, refused to deny that in accordance with the custom of the trade a Standard Memorandum of Sale is considered sufficient, but affirmatively stated that it was entirely "an individual matter." [Tr. p. 246.] *It therefore overwhelmingly appears that the finding of fact by the District Judge that Crane intended "subject to confirmation" and "part payment with confirmation" to mean a Standard Confirmation of Sale, which finding is based solely upon Crane's testimony, is clearly rebutted both by Crane's testimony and by Crane's conduct.*

Findings of fact, even though supported by some substantial evidence, insofar as they are clearly against the weight of the evidence, or are induced by an erroneous view of the law, are not binding upon the appellate court.

Vol. 12 Cyc. Fed. Proc., p. 267, Sec. 6211;
Aetna Life Insurance Co. v. Kepler (C. C. A. 8), 116 F. 2d 1, 5.

A finding is clearly erroneous under Rule 52(a) of the *Rules of Federal Civil Procedure,* when, though there

is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed.

United States v. U. S. Gypsum Co., 333 U. S. 364, 395, 92 L. Ed. 746, 68 Sup. Ct. 525.

When it is a matter of interpreting documentary evidence, the appellate court is in as good a position as the trial court to do so, and the appellate court will not necessarily accept the findings of the trial court.

Kind v. Clark (C. C. A. 2), 161 F. 2d 36.

IV.

There Being No Ambiguity in the Terms of Crane's Telegram of September 26, 1944, It Was Error for the District Judge to Permit the Plain Meaning of the Language of Such Telegram to Be Aborted.

Where a written contract contains no ambiguity or uncertainty in its terms, the construction of such contract must be derived solely from the language therein.

Clark v. Tidewater Associated Oil Co., 98 Cal. App. 2d 488, 220 P. 2d 628.

The trade meaning of the phrase "subject to confirmation" is clearly evident from the construction given to such phrase in the Standard Rules and Definitions of Trade Terms for the Fruit and Vegetable Industry hereinbefore referred to.

The true meaning of the phrase "subject to confirmation" is evidenced by advisory note No. 2 to Rule E of Part II of such rules and definitions of trade terms. This advisory note reads as follows:

"It is unnecessary, when quoting prices, as distinguished from offering to sell, to give notice that

'all quotations are subject to change in market price and to the goods being unsold on receipt of order' or *'subject to confirmation,'* but the practice is recommended because it helps to make clear to prospective buyers that the quotations are not offers to sell but only invitations for offers to buy."

It must be presumed that Crane must have had such trade definition of "subject to confirmation" in mind.

It is inconceivable that an experienced broker, who was as explicit on other matters as was Crane in his telegram of September 26, 1944, would utilize such common phrases as "subject to confirmation" and "part payment with confirmation" as a means of calling for a specific form of document, if that is what he had in mind.

V.

It Was Error for the District Court to Permit Crane, Over the Objections of Appellants, to Testify That the Use of the Phrase "Subject to Confirmation" in the Telegram of September 26, 1944, Constituted a Reference to Confirmation by Use of a Particular Form.

The following proceedings transpired in the trial of the case:

"Q. Now, Mr. Crane, when you sent the original telegram to Southwest Brokerage of September 26th, and when you sent the amended telegram of October 2nd presenting this offer to procure grapes and in which you used the words 'subject to confirmation,' were you in that telegram referring to a confirmation by the use of a Standard Confirmation of Sale as known to the trade?

Mr. Hoppenstein: Just a minute. We object to that on the ground that it would be attempting to vary the terms of his own written instrument, and would be an attempt to invade the mental processes of Mr. Crane.

The Court: Objection overruled.

Mr. Hoppenstein: His intention not having been conveyed to the complainants—

The Court: This testimony goes to the custom of the trade. In other words, whether it was his intention to vary the custom of the trade or to follow the custom of the trade.

You may answer the question.

* * * * * * * *

The Witness: Yes, sir." [Tr. pp. 236, 237.]

It will be noted from the foregoing excerpt of the trial proceedings, that the trial judge justified his admission of the testimony upon the ground that the testimony went to the "custom of the trade."

It is significant to note, however, that the trial court made no finding that a special custom of the trade existed whereby the phrase "subject to confirmation" denotes a standard confirmation of sale form. Crane himself denied that such phrase necessarily held such meaning. [Tr. p. 214.] The rules of trade definitions promulgated by the Secretary of Agriculture which appear on the standard confirmation of sale form clearly indicate that the phrase is strictly a means of informing the person receiving the offer, that the seller has the opportunity of confirming or

rejecting the sale. The meaning which Crane's testimony sought to establish is inherently foreign to the trade meaning recognized by the Secretary of Agriculture's standard rules.

It is firmly established that evidence of an undisclosed intention of parties to a contract is inadmissible. The Supreme Court of California in *Brant v. California Dairies, Inc.*, 4 Cal. 2d 128, 133, 48 P. 2d 13, said:

> "Other statements of similar character were admitted. Together they amount to nothing more than a statement of what Carver personally believed the agreement of the parties to be. But it is now a settled principle of the law of contract that *the undisclosed intentions of the parties are, in the absence of mistake, fraud, etc., immaterial;* and that the outward manifestation or expression of assent is controlling. This is the 'objective' standard established by the modern decisions and approved by authoritative writers. (Citing cases and authorities) * * * In construing a contract, the question whether an uncertainty or ambiguity exists is one of law, and the lower court's finding on this issue is not binding on appeal. * * * No showing of mistake is made here; and *a fair reading of the correspondence discloses the terms of the agreement without uncertainty. The testimony of Carver as to his intention is in direct conflict with the plain meaning of the writings constituting the contract, and was therefore incompetent and inadmissible under the parol evidence rule."* (Emphasis supplied.)

VI.

Even if There Had Been Credible Evidence to Support the District Judge's Findings That Crane Intended That the Phrases "Subject to Confirmation" and "Part Payment With Confirmation" Require the Use of a Standard Confirmation of Sale, Such an Undisclosed Intention Would Not Affect the Validity of a Contract Otherwise Valid.

It must be noted that the District Court did not find that anyone other than Crane himself, attributed any special and unusual meaning to the phrases, "subject to confirmation" and "part payment with confirmation."

> "An undisclosed mental attitude can never constitute the basis of a contractual obligation."
>
> *Gulart v. Azevedo,* 62 Cal. App. 108, 216 Pac. 405.
>
> "Courts will not in deriving one's intention, be controlled by an unexpressed state of mind."
>
> *Canavan v. College of Osteopathic Physicians,* 73 Cal. App. 2d 511, 166 P. 2d 878.

Thus, *Section 20* of the *Restatement of the Law of Contracts* by the American Law Institute, specifies that *manifested mutual* assent rather than *actual mental assent* is the essential element in the formation of a contract.

If Crane, in his telegram of September 26, 1944, intended a meaning other than the usual and plain meaning of the language used, as author of such telegram, it was his duty to make such special intention clear to the recipient thereof.

A letter containing terms of a contract is to be construed most strongly against the party who drafted it.

> *California Civil Code,* Sec. 1654;
>
> *Crillo v. Curtola,* 91 Cal. App. 2d 263, 204 P. 2d 941;

Steelduct Co. v. Henger-Seltzer Co., 50 Cal. App. 2d 475, 123 P. 2d 100.

Where a contract is evidence by correspondence, a letter is construed most strongly against the writer.

Star-Chronicle Publishing Co. v. N. Y. Evening Post (C. C. A. 2), 256 Fed. 435.

A letter, to be relied upon as the basis of a promise, must be given such meaning as it would reasonably have to the addressee.

Williams v. Sawyer Bros. (C. C. A. 2), 45 F. 2d 700.

VII.

There Is No Evidence in the Record to Support the Trial Court's Conclusion That the Telegrams Sent by Crane to Margules Required That Any Contract Entered Into Should Be Confirmed in Writing by the Parties to the Proposed Contract and in Particular, Kazanjian.

Conclusion No. 1 of the District Court is to the effect that the telegrams which Crane sent to Margules required that there be written confirmation from all of the parties to the proposed sale, and particularly by Kazanjian. [Tr. p. 81.] There were no findings of fact to support such conclusion. The telegrams from Crane to Margules speak for themselves. These telegrams are part of the findings of fact. The telegrams and teletype messages from Crane to Margules prior to confirmation of the sale consist of items 1, 3, 4, 6 and 8 of the appendix to this brief. We search such documents in vain for evidence of any such requirement. It is simply a case of the District Court rendering a conclusion of law sans fact findings or evidence in support thereof.

VIII.

There Is No Evidence to Support the Conclusion of the Trial Court That Kazanjian Never Accepted the Terms Proposed by Margules.

As part of conclusion No. 2, the District Court held that Kazanjian never accepted the terms proposed by Margules. [Tr. p. 82.] Prior to confirmation of the sale by Crane and Kazanjian, the communications from Margules to Crane consisted of items 2, 5, 7 and 10 which appear in the appendix to this brief. We search such documents in vain for a proposal of any terms by Margules. We find only acceptance by Margules in behalf of appellants of terms offered by Kazanjian through Crane. Here again the District Court by its conclusion of law attempted to read something into the contract which is not there.

IX.

There Was No Evidence to Support the Conclusion of the Trial Court That the Terms Proposed by Kazanjian in His Telegram to Crane of October 4th Were Never Accepted by Margules or Appellants.

As part of its conclusion No. 2, the District Court held that neither Margules nor appellants had acepted the terms proposed by Kazanjian to Crane in his telegram of October 4, 1944. [Tr. p. 82.] It was contended by Kazanjian in the trial of this case, that this telegram was not a confirmation or a ratification of an oral confirmation, but was an offering of new terms and conditions. The very fact that the telegram commences with the words "15 cars storage U. S. One Emperors December 10th conversion satisfactory at $2.50 etc." indicates a confirmation and an acceptance of the terms stated

rather than an offering of new terms. If otherwise, Kazanjian would more logically have said: "Previous terms unsatisfactory. Will sell only on the following terms, etc."

The terms mentioned in such telegram of October 4 are substantially identical to the terms confirmed by Crane and Margules. With reference to such telegram, Crane was asked, "Was there anything in that telegram that indicated to you that Mr. Kazanjian was quoting terms different from or other than those terms which he had authorized you to confirm to the Southwest Brokerage Company"? Crane's unequivocal answer was, "They were the same terms that we offered to the Southwest Brokerage Company." [Tr. p. 310.]

It is interesting to note that the trial judge did not undertake to make any finding of fact which might indicate wherein the terms described in Kazanjian's telegram of October 4 differed in any respect from the terms specified in the telegram and teletype messages exchanged between Crane and Margules or in the Standard Memorandum of Sale which was transmitted to appellants and Crane by Margules.

On cross-examination, Kazanjian was requested to point out wherein his telegram of October 4th to Crane consisted of different terms, and wherein he designated that the terms under which Crane had sold for Kazanjian's account were not satisfactory to Kazanjian. The answer was never received because the court sustained an objec-

tion to the question upon the ground that the question was argumentative. [Tr. p. 186.]

Reading Crane's telegram to Kazanjian of October 3, 1944, and Kazanjian's reply to Crane by telegram of October 4, 1944, it is apparent that both such individuals were expressing agreement, and were making reference to the terms upon which they had agreed in a telephone conversation that preceded such telegrams.

The fact that Kazanjian did not use the identical language used by Crane is unimportant. It was clearly the intention of the telegram of October 4th to confirm as satisfactory the notification that Crane had given to Kazanjian on October 3 that he had sold the grapes for Kazanjian's account on the terms therein outlined.

> "It is not essential to the acceptance of defendant's proposal that plaintiff should use the same identical language used in the proposal. Any form of expression showing clearly an intention to accept on the terms proposed or to consent to the same subject-matter in the same sense is sufficient if coupled with no new conditions." *Ennis Brown Co. v. W. S. Hurst Co.*, 1 Cal. App. 752 (third syllabus), 82 Pac. 1056.

Evidence of agreement could not be any clearer.

X.

The Statute of Frauds of California Is Inapplicable to an Action Brought for Damages Under the Perishable Agricultural Commodities Act.

The District Court held that since there was no written evidence of authority from appellants to either Margules or Crane as brokers, the contract was unenforceable under California law. [Tr. p. 82.]

The pertinent provisions of the California Statute of Frauds read as follows:

Civil Code, Section 2309:

> "An oral authorization is sufficient for any purpose, except that an authority to enter into a contract required by law to be in writing can only be given by an instrument in writing."

Civil Code, Section 2310:

> "A ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified, or where an oral authorization would suffice, by accepting or retaining the benefit of the act with notice thereof."

Civil Code, Section 1624a:

> "(1) A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upward shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receives the same, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf. * * *"

Section 1624a of the *Civil Code* is in language identical to *Section 4* of the *Uniform Sales Act*. The Statute of Frauds of the State of Pennsylvania which was involved in the case of *Rothenberg v. H. Rothstein & Sons* (C. C. A. 3), 183 F. 2d 524, is also of identical language. The *Rothenberg* case considered the question as to whether a procedural statute of frauds, such as common to California and Pennsylvania, was a bar to enforceability of an action brought under the Perishable Agricultural Commodities Act.

The California courts have uniformly held that the California statute of frauds is a procedural statute.

Dessert Seed Co. v. Garbus, 66 Cal. App. 2d 838, 844, 153 P. 2d 184;

Producers Fruit Co. v. Goddard, 75 Cal. App. 737, 755, 243 Pac. 686;

Levi v. Murrell (C. C. A. 9), 63 F. 2d 670, 671.

In *Rothenberg v. H. Rothstein and Sons, supra,* the Court of Appeals for the Third Circuit points out that jurisdiction in this type of case is not based upon diversity of citizenship, but upon a federal remedy. It therefore holds that in the case of a contract which may have been unenforceable under the Pennsylvania Statute of Frauds, the maintenance of a reparation proceeding under the Perishable Agricultural Commodities Act before the Secretary of Agriculture and thereafter in the District Court is not precluded.

XI.

The Absence of a Written Memorandum Signed by Appellants and the Absence of Written Authority to Appellants' Broker Was No Bar to Recovery Herein as the Statute of Frauds Is Concerned Only With the "Party to Be Charged."

Because the case of *Rothenberg v. H. Rothstein, supra,* appears completely determinative of the issue of the Statute of Frauds, we shall be most brief in pointing out, that, irrespective of such decision, the California Statute of Frauds is concerned only with *the party to be charged,* the defendant in the proceeding.

In the case of *Cowan v. Tremble,* 111 Cal. App. 458, 462, 296 Pac. 91, the court said:

> "Moreover, contracts within the statute of frauds *need be subscribed only by the party to be charged or his agent* (Civ. Code, sec. 1624), and may be enforced notwithstanding they are not signed by the plaintiff or his authorized agent. (Cavanaugh v. Casselman, 88 Cal. 543 (26 Pac. 515); Scott v. Glenn, 98 Cal. 168 (32 Pac. 983.) *Nor does this rule render the contract liable to the objection of a lack of mutuality, for by bringing the suit the plaintiff binds himself to abide by the judgment of the court.* (Harper v. Goldschmidt, 156 Cal. 245 (134 Am. St. Rep. 124, 28 L. R. A. (N. S.) 689, 104 Pac. 451); Allen v. Dailey, 92 Cal. App. 308 (268 Pac. 404); Williston on Contracts, sec. 140, p. 314.)" (Emphasis supplied.)

See also *Steel v. Duntley,* 115 Cal. App. 451, 452, 1 P. 2d 999, where the court said:

> "The statute of frauds does not require the signature of any party other than the one to be charged. Following an oral contract * * * defendant and

plaintiff signed separate escrow instructions, the defendant signing personally, the plaintiff by her nephew, who had acted as her agent throughout the deal. It is of no consequence that the nephew had no written authorization to act as plaintiff's agent. These escrow instructions * * * constitute a written contract subscribed by the party to be charged, *i. e.,* the defendant."

See also:

18 *Cal. Jur.* p. 917, Sec. 86.

It should be noted also that the agency between appellants and Margules as broker *was created within the State of Texas where there is no statute of frauds requiring the broker's authority in this type of suit to be in writing.*

XII.

The District Court's Finding That Crane Made No False Representation Is Irreconcilable With Its Conclusion That Kazanjian Had Not Confirmed the Sale.

By Finding No. X, the District Court found that the statements and representations made by Crane were neither false nor fraudulent. [Tr. p. 81.] This finding was made despite Finding No. IV which found that on October 2, 1944, Crane sent a night letter to Margules stating that he had secured confirmation from Kazanjian. [Tr. p. 75.]

Falsity and untruth are synonymous.

The word "false" is defined in Webster's International Dictionary (Second Edition) as meaning: "Not according with truth or reality; not true; erroneous; incorrect; as, a *false* statement."

We do not, of course, agree with the District Court's ruling that Kazanjian had not confirmed the sale. But

assuming for the sake of argument that there was evidence to support such conclusion, it is incomprehensible how the trial court could also hold that Crane was not making a false statement when he reported to Margules that he had received Kazanjian's confirmation.

The significance of the finding was this: If Crane had falsely represented such fact to Margules, Crane would be liable to appellants for violation of *7 U. S. C. A.,* Section 499b(4), which declares that it is unlawful "for any * * * broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction" in interstate commerce, or "to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction."

Section *499f of 7 U. S. C. A.* affords reparation damages for violation of Section *499b.*

Obviously the misrepresentation of confirmation (if it were a misrepresentation) constituted a fraud upon appellants. It was admittedly made with intent that appellants rely thereon. [Tr. p. 446.] If, as Crane contended, the Standard Memorandum of Sale which Margules sent him on October 3rd was not the form he intended to be used, he was under a duty under *Section 499b* to so notify Margules and request the form of confirmation he did expect.

Finding No. X represents an effort by the District Judge to absolve both appellees of liability in a case where, if one is not liable, it inevitably follows that the other is liable. To accomplish such absolution, the District Judge was compelled to indulge in the absurdity that a false statement is not a false statement.

XIII.

The Contract Was Not in Violation of the Emergency Price Control Act.

The District Judge found that the maximum ceiling price for grapes had been exceeded by the agreement of appellants to pay a $50.00 per car procurement commission to Crane for procurement services. [Tr. p. 80.] He did not render a conclusion of law thereon. In his memorandum opinion, the District Judge declared that he did not think such finding was necessary for his decision but if he is reversed by the higher courts he would then hold the contract was in violation of the price regulations.

This court recently decided this precise question in the case of *Joseph Denunzio Fruit Co. v. Crane,* 188 F. 2d 569 (rehearing denied), holding that the same terms as herein involved did not constitute a violation of the price control act. It would be superfluous to argue the point further.

XIV.

The Fact That on October 24, 1944, Appellants Contracted to Purchase Some Replacement Grapes Does Not Alter the Measure of Damages as Being Based Upon the Value of Grapes on December 10, 1944, the Date for Delivery Specified by the Contract.

Here again, although unnecessary to his decision, the District Judge was anxious to notify counsel what he would do in the event of reversal by the appellate court. [Tr. pp. 258, 259.] He therefore found that on October 24, 1944, appellants, having been informed that Kazanjian would not ship the grapes, "commenced to purchase"

replacement grapes. [Tr. p. 79.] He also found that the reasonable market value of U. S. No. 1 Emperor grapes between *October 10, 1944, to and including November 15, 1944,* was $3.25 per lug. [Tr. p. 79.] As a conclusion of law, the trial judge held that complainants acquiesced in the repudiation on October 24th by contracting to purchase replacement grapes. [Tr. p. 82.]

While we can point out that Crane as Kazanjian's agent [Tr. p. 289] notified Margules that *Kazanjian turned down $3.40 per lug* for his entire stock of *uninspected grapes* on October 12, 1944 [Tr. p. 476], the market value of Emperor grapes as to the dates mentioned is immaterial. *The significant date is the date of delivery under the contract, i. e., December 10, 1944.* The District Court made no finding as to the December 10th value of Emperor grapes U. S. No. 1 quality certified by government inspection. The finding of the Secretary of Agriculture that the market value of such grapes on December 10th was $4.00 per lug is therefore presumptively correct. [Tr. p. 61.] (*7 U. S. C. A.,* Sec. 499g(c).)

The contention that the purchase of some replacement grapes on October 24th constitutes an acquiescence in the repudiation, stands in interesting contrast to the contention of Crane in the case of *Denunzio v. Crane, et al.,* 79 Fed. Supp. 117 (see page 130), for in that case counsel for Crane affirmatively contended that "when we (Crane and/or Kazanjian) notified them (Rains and/or Denunzio) that there would be no performance of this contract, it was his duty (Rains and/or Denunzio) to go out and secure grapes and he had no business waiting until December 10 (1944) before he secured them."

If the making of replacement purchases to minimize damages constitutes an acquiescence in the breach, then

appellees contend that when a party to a contract is advised of repudiation by the other party, he is under *a duty to acquiesce* in the repudiation.

The California rule on the proper measure of damage, as expressed in *U. S. Trading Corp. v. Newmark,* 56 Cal. App. 176, 191, is:

> "In measuring damages, the rule is that if, before the time when the buyer may rightfully demand delivery, the seller gives notice of an intention not to deliver, the market price as of the date when the delivery may rightfully be demanded by the buyer will govern, and not the market price on the date of such notice or anticipatory breach."

As the late Judge O'Connor pointed out at page 130 of his decision in the *Denunzio* case, the buyer "was not obliged to anticipate at his peril, that the cost of grapes would be less prior to December 10, 1944."

In *Compania Engraw etc. v. Schenley Distilleries Corp.,* 181 F. 2d 876, this court declared the California law to be that in the absence of actual acquiescence in the repudiation, the date of contractual delivery and not the date of repudiation governs the measure of damages.

In purchasing available grapes for replacement purposes, appellants were not acquiescing in the repudiation. As the Secretary of Agriculture found, "the evidence shows that complainants were diligent in their efforts to replace the 10 carloads of grapes after receiving notice that the grapes would not be stored or shipped." [Tr. p. 60.] The Secretary determined damages by the difference between the contract price and the cost of replacement purchases as to replaced grapes, and the difference between the contract price and the market price on December 10, 1944 (date of delivery under the contract), on unreplaced

grapes. [Tr. pp. 60-62.] This, in our opinion, represents the "loss directly and naturally resulting in the ordinary course of events from the seller's breach of contract" in accordance with subdivision (2) of Section 1787 of the California Civil Code (Uniform Sales Act, Sec. 67(2)).

Conclusion.

Essentially the instant case is a simple one. After Kazanjian obligated himself to sell ten cars of grapes to appellants at the O.P.A. ceiling price of the grapes, the O.P.A. ceiling was lifted, and the price of grapes went up. Kazanjian then attempted to obtain a higher price from appellants than contracted for. Appellants stood on their bargain.

The barrage of defenses which appellees fired upon appellants' case represents the desperate effort of Kazanjian as a defaulting party to escape the consequences of his breach. Originally the explanation for the breach was the frustration of contract by the lifting of the ceiling price. No other defense was mentioned in the correspondence of the parties. When the case reached the Secretary of Agriculture, appellees were apparently convinced that the frustration theory would not hold. It was promptly abandoned, and the defense was then centered upon the statute of frauds and an absence of a contract. By the time this case had reached the District Court, a further defense was developed to the effect that the contract was illegal by reason of an alleged violation of price ceiling regulations. During the course of the trial *de novo* in the District Court, still a further defense was

added, namely, that the contract called for a particular form of confirmatory document which had never been executed.

The reasonableness of these defenses is unalterably destroyed by inconsistent and contradictory testimony of appellees themselves, and the obvious origin of the defenses as "afterthoughts." Kazanjian refused to fulfill his contract to sell the grapes because the market price of grapes had risen. It is not uncommon for a person in such a position to ascribe multitudinous reasons for a breach of contract, particularly, the assertion that there was no contract.

In the language of this court in the case of *Compania Engraw etc. v. Schenley Distillers Corp.,* 181 F. 2d 876, at page 878:

> "For experience teaches that seldom is a defrauding party inarticulate in the assertion of some plausible reason for default. *And the most common of these excuses is that there was no contract at all!"* (Emphasis supplied.)

The decision of the District Court enables the seller to escape his liability under a contract which clearly and unmistakably committed him to the sale of the grapes in question. It clothes the obviously shameful defenses of the defendant with judicial dignity. The decision is a serious threat to the maintenance of confidence in the sanctity of contracts. The business world depends upon the integrity of contracts. Without such assurance commerce cannot long endure. It is essential that courts zealously pro-

tect that integrity. In the words of Chief Justice Taney in the case of *Gibson v. Stevens* decided by the United States Supreme Court in 1850, 49 U. S. 384, 397:

> "For if, by any decision of this court, doubt should be thrown upon the validity and safety of a contract fairly made according to the usages of this trade, and in the ordinary course and forms of business, the want of confidence would seriously embarrass its operations, to the injury of all connected with it, and would certainly be not less injurious to the agriculturist and producer than to the merchant and trader."

Respectfully submitted,

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APPENDIX.

Chronological Résumé of Written, Telegraphic and Teletype Exchanges Between Parties.

(Code words are translated.)

1. September 26, 1944. CRANE to MARGULES. Telegraphic night letter to various brokers including Margules (Southwest Brokerage Company of Dallas, Texas) as follows:

> "Can book Emperors—nine cars U S One and nine cars unclassified or 18 cars—Vineyard run grade—to go into storage—Packing to commence rate of one or two daily October 9th—We to personally inspect AFOHD [F.O.B. acceptance final] basis our inspection—Shipper to transfer title on or after December 10th he paying all storage charges. Packed 28# net—Display new lugs lidded—Calripe or comparable brand—$500 part payment with confirmation—price 2.53 net to shipper which ceiling that time—we charging 50.00 per car procurement charge—ADLAM [offered subject to confirmation] CORLU [wire immediately, must have answer] Thursday. ADLAS [offer subject to confirmation shipping point] immediate UPTMU [tomatoes 6 x 6 and larger]—New Crop Edson District—ALBIQ [approximately 85%] 3.25—Can secure 3-4 cars uninspected account [because of] heavy puff heavy sidewalls. Would grade AIBIEIQ [approximately 80-85%] except for puff which is not a serious defect account of heavy sidewall 2.50." [Tr. p. 450.]

2. September 27, 1944. MARGULES to CRANE. Teletype message, as follows:

> "Referring quotation on nine cars U S One and nine unclassified Emperors—do we have to buy all of them or can we get someone buy possible couple of each. Go ahead." [Tr. p. 421.]

3. September 27, 1944. CRANE to MARGULES. Teletype message as follows:

> "Believe we could work a deal on block of two-three each. Submit it and will see if can work out." [Tr. p. 421.]

4. October 2, 1944. CRANE to MARGULES (and various other brokers). Telegram as follows:

> "CPFGP [referring to our night letter of 26th] quoting future Emperors—secured revised deal—fifteen cars U S One 2.50 net—same deal—CORSD [wire quick if wanted] any part." [Tr. p. 451.]

5. October 2, 1944. MARGULES to CRANE. Teletype message as follows:

> "Referring that 6 Emperors Ft Worth and 4 Dallas—deal okay—2.50 net—50.00 for you if legal. Advise. Go ahead." [Tr. p. 475.]

6. Same day. CRANE to MARGULES. Teletype message as follows:

> "Haven't been able contact the shipper yet but sure its okay. Will wire you definitely one way or other soon as get him. Yes, it is legal—naturally a receiver can pay his whole markup for buying brokerage if he wants to—will wire you soon as receive definite confirmation. Understand its basis 1,000.00

deposit against each U S One inspection as they are loaded. What else new. Go ahead." [Tr. pp. 475, 476.]

7. Same day. MARGULES to CRANE. Teletype message as follows:

"Far as I know that covers it. Try wire night—sure this end. O K. End." [Tr. p. 476.]

8. Same day. CRANE to MARGULES. Telegraphic night letter as follows:

"Secured Redlyon Packing Company confirmation ten cars grapes as outlined. You collect deposits to be forwarded to us soons Dupja [government inspection] wired each car." [Tr. p. 25.]

9. October 3, 1944. CRANE to MARGULES. Teletype message as follows:

"Did you sell entire ten cars Emperors? Corey others waiting. Do Aflep tomatoes 30906? First car arrived Kaysee today reported beautiful quality." [Tr. p. 474.]

10. Same day. MARGULES to CRANE. Teletype message as follows:

"What are U talking about? We ordered and U already confirmed by wire 10 cars Emperors advise. Unarrived Toms 30906 sell elsewhere if U desire." [Tr. p. 475.]

11. Same day. CRANE to KAZANJIAN (Red Lion Packing). Telegram as follows:

"Referring telephone have sold for your account basis 2.50 lug net to you block Emperors mentioned—five cars basis 750.00 car deposit—ten cars basis 1000.00

deposit—to be paid upon receipt US ONE Government inspections—now depending you handle through us balance cars you mentioned for fresh shipment—advise when expect ship these—believe we could place them now—ceiling PRICDXXX price with deposits—selling basis ability make US ONE grade—suggest give us approximate shipping dates—mays well get cleaned up since ceiling precludes any possibility higher market time of shipment—will forward confirmations for your signature soons receive airmail from buyers." [Tr. p. 453.]

12. Same day. MARGULES to CRANE, CENTRAL FRUIT & VEGETABLE Co. of Dallas, Texas, and WEST TEXAS PRODUCE Co. of Ft. Worth, Texas. Standard Memorandum of Sale signed by MARGULES as Broker.

This document refers to sales to West Texas Produce Co. of 6 cars and to Central Fruit & Produce of 4 cars for the account of "(Seller) Associated Fruit Dist. of Los Angeles, Calif. (a/c Red Lion Pkg. Co.)"; recites: "sale made f.o.b. acceptance final"; recites: "Terms draft West Texas thru First Nat'l Bank, Ft. Worth * * *, draft Central Fruit thru Mercantile Bank, Dallas"; and further recites: "Quality Commodity and Specifications Price ten (10) cars government inspected U. S. #1 Emperor grapes 28# net @ 2.50 f.o.b. plus 50.00 buying service for Associated, plus our brokerage 3½ lug. (To go into storage, packing to commence rate of one or two daily starting about October 9th. Shipper to transfer title on or after December 10th, Shipper pays all storage charges. New lidded display lugs, 'Calripe,' or comparable brand, partial

payment 1000.00 per car to be made by buyers with government inspection report each car.)" [Tr. pp. 27, 28.]

13. October 4, 1944. KAZANJIAN to CRANE. Telegram as follows:

"Fifteen cars storage U. S. One Emperors December Tenth conversion satisfactory at two dollars and fifty cents FOB Exeter guaranty by buyer. One thousand dollars deposit on 10 cars and seven hundred fifty dollars on five cars said deposit to be paid immediately on inspection at shipping point. You to arrange for storage as agreed. Balance of pack intend to load after Oct. twentieth will be glad to make deal on same about the 15th of Oct." [Tr. p. 454.]

14. October 10, 1944. MARGULES to CRANE. Telegram as follows:

"Understand ceiling lifted table grapes, whats to prevent shipping some these ten cars instead putting all in storage. Advise. *Re* tomatoes twos Aceankist Biltmore sold track 2.00 delivered various shippers rolling sale arrival. Will AFLEP anything which arrives here." [Tr. p. 481.]

15. Same day. CRANE to MARGULES. Telegram as follows:

"Shipper Redlion takes view account ceiling lifted any contracts Emperors voided. Willing go along give your trade preference shipping as packed at market price which today 3.25. AFOHD [f.o.b. acceptance final] Advise." [Tr. p. 481.]

16. Same day. MARGULES to J. W. CURRY, WAR FOOD ADMINISTRATION REGULATORY DIVISION, WASH., D. C. Telegraphic night letter as follows:

> "Contract made ten days ago with California shipper as agent for another party for ten cars Emperor grapes at 2.50 FOB packing starting October 10th shipment from storage California starting December 9th. Table grape regulation lifted today. Shipper states other party considers contract void. Willing to ship basis now 3.25 FOB. Appreciate advise your ideas morning as to status of contract." [Tr. p. 482.]

17. October 11, 1944. T. C. CURRY, WAR FOOD ADMINISTRATOR TO MARGULES. Telegram as follows:

> "Retel. Based on facts presented would appear California shipper obligated deliver ten Emperors 2.50 FOB. Don't see where lifting OPA ceiling has any effect on contract this kind. If can assist further advise." [Tr. p. 479.]

18. Same day. MARGULES to CRANE. Telegram as follows:

> "Answering Curry, War Food Administration, says lifting OPA ceiling has not effect on this contract. Better advise Red Lion accordingly today. Get definite answer yes or no whether going ship per contract now or later so buyer also ourselves know how to handle advise." [Tr. p. 480.]

19. Same day. CRANE to MARGULES. Teletype message.

> "Please call us collect 10 a. m. our time tomorrow Tucker 3839 regarding Emperor deal." [Tr. p. 478.]

20. October 12, 1944. CRANE to MARGULES. Telegraphic night letter.

"As final gesture and endeavoring to amicably settle grape contract Red Lion Packing Company willing sell Basis 3.00 net FOB quantities specified on contract. Buyer to pay us .10 pkge procurement. Quality is nice uninspected field run but Red Lion states in all probability fruit easily grade U. S. One arrival, but not willing make this guarantee. Our inspector has seen fruit. Says really beautiful. If buyers wish we will arrange to put cars storage which we have already under contract. Otherwise Red Lion takes attitude that after all he had nothing to do with ceiling. Feels he relieved all moral responsibility by making this offer. Claims turning down offers his entire outfit today basis 3.40 cash FOB." [Tr. p. 476.]

21. October 13, 1944. MARGULES to KAZANJIAN. Telegraphic night letter.

"Re ten cars Emperors confirmed by you thru Associated for West Texas Produce and Central Fruit, we wiring Associated tonite offer of 3.00 FOB plus 10¢ procurement charge unacceptable and buyers want contract fulfilled as confirmed. If not going thru on this basis please so advise immediately by wire as buyers desire take action protect their interests. Personally don't see how lifting ceiling has any thing to do with contract which was made at definite price and Washington has wired us to this effect also. Advise promptly direct or thru Associated. Thanks." [Tr. p. 477.]

22. Same day. MARGULES to CRANE. Telegraphic night letter.

> "Tomatoes really shot 1.25 to 2.00 delivered. Unarrived fars I know 18378 but really believe you do better elsewhere. Will AFLEP if any received 18378. Regarding 10 car Emperor deal West Texas and Central say offer per your wire unacceptable. Want definite yes or no by tomorrow if contract not going to be filled by responsible party so can take whatever action they deem proper." [Tr. p. 479.]

23. October 16, 1944. CRANE to MARGULES. Teletype message as follows:

> "Again talked Redlion. They state definitely unwilling abide any sales made where ceiling definite consideration. Furthermore crop short. Not packing U. S. One grade. Duquk case for courts decide since ceiling taken off unexpectedly. Nobody knows whether or not such deal enforceable. Offer suggestion you take whatever action deem advisable." [Tr. p. 482.]